

ATTACHMENT
A

TRANSCRIPT OF OPINION

MOTIONS BEFORE THE HONORABLE WHEELER A. ROSENBALM

May 25, 2012

IN THE CIRCUIT COURT FOR KNOX COUNTY, TENNESSEE

-----)
FIRST COMMUNITY BANK f/k/a)
FIRST COMMUNITY BANK, N.A.,)
)
Plaintiffs,)
) No. 3-475-11
vs.)
)
FIRST TENNESSEE BANK, N.A. d/b/a)
FTN FINANCIAL CAPITAL MARKETS, et al.,)
)
Defendants.)
-----)

APPEARANCES:

FOR THE PLAINTIFF FIRST COMMUNITY BANK
F/K/A FIRST COMMUNITY BANK, N.A.:

DANIEL P. LYNCH, Esq.
WILLIAM J. WYRICK, Esq.
Lynch Weis, LLC
Cranberry Professional Park
501 Smith Drive, Suite 3
Cranberry Township, Pennsylvania 16066

LAWRENCE F. GIORDANO, Esq.
SHANNON VAN TOL, Esq.
Lewis, King, Krieg & Waldrop, P.C.
620 Market Street, Fifth Floor
Post Office Box 2425
Knoxville, Tennessee 37901-2425

1 FOR THE DEFENDANTS FIRST TENNESSEE BANK, N.A. DBA
2 FTN FINANCIAL CAPITAL MARKETS AND FTN FINANCIAL
SECURITIES CORP.:

3 MARK D. GRIFFIN, Esq.
4 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
First Tennessee Building
5 165 Madison Avenue, Suite 2000
Memphis, Tennessee 38103

6
7 FOR THE DEFENDANT KEEFE, BRUYETTE & WOODS, INC.:

8 ERIC HEICHEL, Esq.
Eiseman Levine Lehrhaupt & Kakoyiannis
9 805 Third Avenue
New York, New York 10022

10 JAMES A. HOLIFIELD, Esq.
Holifield & Associates, PLLC
11 8351 East Walker Springs Lane, Suite 303
Knoxville, Tennessee 37923

12
13 FOR THE DEFENDANTS PREFERRED TERM SECURITIES X,
LTD., PREFERRED TERM SECURITIES XII, LTD.,
14 PREFERRED TERM SECURITIES XIV, LTD., PREFERRED
TERM SECURITIES XVI, LTD., PREFERRED TERM
15 SECURITIES XXII, LTD., PREFERRED TERM SECURITIES
XXIII, LTD., PREFERRED TERM SECURITIES XXVI, LTD.,
16 PREFERRED TERM SECURITIES X, INC., PREFERRED TERM
SECURITIES XII, INC., PREFERRED TERM SECURITIES
17 XIV, INC., PREFERRED TERM SECURITIES XVI, INC.,
PREFERRED TERM SECURITIES XXII, INC., PREFERRED
18 TERM SECURITIES XXIII, INC., PREFERRED TERM
SECURITIES XXVI, INC., TRAPEZA CDO XIII, LTD.,
19 TRAPEZA CDO XIII, INC., SOLOSO CDO 2007-1 LTD.,
AND SOLOSO CDO 2007-1 CORP.:

20
21 RIPLEY HASTINGS, Esq.
Nixon Peabody LLP
100 Summer Street
22 Boston, Massachusetts 02110

23 ANDREW L. COLOCOTRONIS, Esq.
Wagner, Myers & Sanger, P.C.
24 1801 First Tennessee Plaza
Post Office Box 1308
25 Knoxville, Tennessee 37901-1308

1 FOR THE DEFENDANTS J.P. MORGAN SECURITIES LLC
2 F/K/A J.P. MORGAN SECURITIES INC., INDIVIDUALLY
3 AND AS SUCCESSOR IN INTEREST TO BEAR, STEARNS &
4 CO. INC., AND BEAR, STEARNS & CO. INC:

5 KEVIN J. ORSINI, Esq.
6 TAMARA A. RUBB, Esq.
7 Cravath, Swaine & Moore LLP
8 825 Eighth Avenue
9 New York, New York 10019-7475

10 JOHN A. LUCAS, Esq.
11 Merchant & Gould
12 110 McGhee Tyson Boulevard
13 Suite 203
14 Alcoa, Tennessee 37701

15 FOR THE DEFENDANT MORGAN KEEGAN & CO., INC.:

16 THOMAS K. POTTER, III, Esq.
17 Burr & Forman LLP
18 700 Two American Center
19 3102 West End Avenue
20 Nashville, Tennessee 37203

21 FOR THE DEFENDANT TRAPEZA CAPITAL
22 MANAGEMENT, LLC:

23 MARK P. GIMBEL, Esq.
24 Covington & Burling LLP
25 The New York Times Building
620 Eighth Avenue
New York, New York 10018-1405

RUSSELL E. STAIR, Esq.
Bass, Berry & Sims PLC
1700 Riverview Tower
Knoxville, Tennessee 37902

FOR THE DEFENDANT SUNTRUST ROBINSON HUMPHREY, INC.
F/K/A SUNTRUST CAPITAL MARKETS, INC.:

S. LAWRENCE POLK, Esq.
Sutherland Asbill & Brennan LLP
999 Peachtree Street, NE
Atlanta, Georgia 30309-3996

1 JOHN E. WINTERS, Esq.
Kramer Rayson LLP
2 800 South Gay Street, Suite 2500
Post Office Box 629
3 Knoxville, Tennessee 37901-0629

4
5 FOR THE DEFENDANTS MERRILL LYNCH, PIERCE, FENNER &
SMITH, INCORPORATED AND BANK OF AMERICA
6 CORPORATION AS SUCCESSOR IN INTEREST TO MERRILL
LYNCH, PIERCE, FENNER & SMITH, INCORPORATED:

7 ROGER A. COOPER, Esq.
JARED GERBER, Esq.
8 Cleary Gottlieb Steen & Hamilton LLP
One Liberty Plaza
9 New York, New York 10006

10
11 FOR THE DEFENDANT MOODY'S INVESTORS
SERVICE, INC.:

12 JAMES J. COSTER, Esq.
JAMES DOTY, Esq.
13 Satterlee Stephens Burke & Burke LLP
230 Park Avenue
14 New York, New York 10169

15 DWIGHT E. TARWATER, Esq.
Paine, Tarwater & Bickers, LLP
16 Riverview Tower
900 South Gay Street, Suite 2200
17 Knoxville, Tennessee 37902-1821

18
19 FOR THE DEFENDANT FITCH, INC. D/B/A FITCH
RATINGS:

20 ROBERTA A. KAPLAN, Esq.
JACOB H. HUPART, Esq.
21 Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas
22 New York, New York 10019

23 BERNARD E. BERNSTEIN, Esq.
Bernstein, Stair & McAdams LLP
24 The Trust Company Building
4823 Old Kingston Pike, Suite 300
25 Knoxville, Tennessee 37919

1 FOR THE DEFENDANT THE MCGRAW-HILL COMPANIES, INC.
2 D/B/A STANDARD & POOR'S RATINGS SERVICES:

3 FLOYD ABRAMS, Esq.
4 TAMMY L. ROY, Esq.
5 Cahill Gordon & Reindel LLP
6 80 Pine Street
7 New York, New York 10005

8 W. KYLE CARPENTER, Esq.
9 Woolf, McClane, Bright, Allen & Carpenter, PLLC
10 900 Riverview Tower
11 900 South Gay Street
12 Post Office Box 900
13 Knoxville, Tennessee 37901-0900

14 ALSO APPEARING:

15 ALAN G. STAHL, Esq.
16 604 Washington Avenue
17 Suite 2
18 Bridgeville, Pennsylvania 15017

19
20
21
22
23
24
25 REPORTED BY: JANA NEIGHBORS, RPR, CCR, LCR

1 (The following proceedings were had in open
2 court on May 25, 2012, before the Honorable
3 Wheeler A. Rosenbalm.)

4 THE COURT: Well, this case is not without
5 difficulty, as is witnessed by the 260-page
6 complaint that was filed in this lawsuit, and
7 the task that you have given to me is extremely
8 difficult, and I again want to thank you for
9 the very, very able briefs that were filed by
10 everyone to help me reach the right kind of
11 result.

12 I agree that it is difficult to dispose of
13 a case at this stage, the pleading stage, yet
14 there are parameters, standards, that we
15 lawyers and judges are supposed to follow, and
16 they're pretty well spelled out in our case law
17 and in the Rules of Civil Procedure. And so
18 I'm going to try to decide the issues that we
19 have here today as best I can based upon my
20 understanding of those standards, and it
21 worries me a little bit to attempt to do that
22 because I agree with counsel that, in some
23 respects, we are a very liberal pleading state.
24 In any event, we have these issues that have
25 been raised by the various motions in this

1 case, and I'm going to try to decide those
2 motions without any considerable elaboration
3 because I don't think that's necessary, I don't
4 think you want that.

5 First we have to deal with the question in
6 this case of whether the plaintiff is entitled
7 to take discovery, further discovery, on the
8 issue of personal jurisdiction over those
9 defendants who have put into issue or question
10 the Court's jurisdiction over their person.

11 And, briefly, it is my understanding of the
12 law of this state that when a defendant raises
13 a personal jurisdiction issue by an adequately
14 supported motion to dismiss, that the burden
15 shifts to the plaintiff or is upon the
16 plaintiff to establish a prima facie case of
17 jurisdiction by appropriate averments or, if
18 necessary, affidavits, and that after having
19 furnished the Court with affidavits or other
20 materials in opposition to the motion to
21 dismiss, it may be necessary in certain
22 instances to permit discovery on the issue of
23 jurisdiction.

24 However, great caution must be urged, must
25 be adhered to or followed, in permitting

1 discovery at this stage of litigation. If we
2 permit extensive discovery, even on
3 jurisdictional issues, that is not warranted by
4 the state of the record at that point, then we
5 deprive the defendant, who has a liberty
6 interest in not being drawn into court
7 everywhere, we deprive the defendant of the
8 very protection the due process clause was
9 designed to afford him.

10 And in this case, it appears to this Court
11 that the defendants that have filed Rule 12
12 motions questioning or challenging the
13 jurisdiction of the court have supported those
14 motions with appropriate affidavits, and the
15 plaintiff has furnished some affidavits in
16 response to the defendants' motions, but the
17 Court is constrained to conclude that the
18 plaintiff has not established such a prima
19 facie case that it should be permitted at this
20 point to inquire by discovery further about the
21 personal jurisdiction defense, and so this
22 Court most respectfully denies that implicit
23 request which is in plaintiff's motion for a
24 status conference and sustains those motions
25 filed by defendants for either protective

1 orders or to quash on that issue.

2 And having done that, the Court is called
3 upon to decide the question of personal
4 jurisdiction over the defendants who have
5 raised that issue. Has the plaintiff
6 established that it is entitled to proceed
7 against those defendants in this court at this
8 time? The Court hears the plaintiff arguing
9 that there is information here both from which
10 the Court could conclude that there is general
11 jurisdiction over these defendants, and that
12 there's case-specific jurisdiction, but the
13 Court is constrained to conclude that the
14 information in this record is not sufficient to
15 permit that conclusion.

16 The plaintiff further proceeds by an
17 amended complaint which seeks to establish a
18 conspiracy among the defendants such as would
19 enable plaintiff to reach out beyond the
20 borders of this state and draw in people,
21 because of the conduct of others, with whom
22 they had made some kind of agreement to either
23 engage in unlawful conduct or engage in lawful
24 conduct by the employment of unlawful means,
25 but that allegation or those allegations of

1 conspiracy jurisdiction are generally vague and
2 really are little more than the kind of group
3 pleading that the plaintiff employs in the
4 remainder of this action against all of the
5 parties.

6 The Court is not constrained to conclude
7 and holds that the plaintiff has not
8 established an entitlement to proceed against
9 the rating agencies and the issuers, who have
10 each raised well-supported motions to dismiss
11 for a lack of personal jurisdiction, and the
12 motions of each and all of those particular
13 defendants is respectfully sustained.

14 Having sustained the objection, the motions
15 of the defendants, based upon a lack of
16 personal jurisdiction raises an interesting
17 question about whether the Court should proceed
18 to deal with the issues that those same
19 defendants have raised by motions to dismiss
20 for failure to state a claim upon which relief
21 can be granted. One might say that if the
22 Court has excluded those parties from the
23 lawsuit on jurisdictional grounds so that the
24 plaintiff cannot obtain any other relief in the
25 case from those defendants, the Court is not in

1 a position to grant any further relief to those
2 defendants, but I know and you know that this
3 case is going to the Court of Appeals, maybe
4 even beyond, and so I feel that under the
5 circumstances, the Court is warranted in
6 considering the motions to dismiss based upon
7 the failure to state a claim for relief that
8 have been asserted by those defendants as well
9 as all of the other defendants in the case, and
10 so I'll attempt to rule on those issues also.

11 As a part of the respective defendants'
12 motions to dismiss for failure to state a
13 claim, the defendants assert that the claims
14 bought by plaintiff in this case are barred by
15 the statute of limitations. The defendants
16 refer to the three-year statute of limitations
17 in 28-3-105 that apply to various tort claims
18 and, in the opinion of this Court, apply to all
19 of the claims involved in this case.

20 Further, defendants rely upon the two-year
21 statute of limitations and the five-year
22 statute of repose contained in the Tennessee
23 Securities Act, insofar as that act is relied
24 upon in this case. And the Court recalls that
25 there were a couple of transactions in which

1 plaintiff engaged in the year 2003 and are
2 clearly beyond the five-year statute of repose
3 in the Tennessee Securities Act legislation,
4 and so to the extent that those claims are
5 still in the lawsuit, the Court concludes and
6 so most respectfully holds that those
7 transactions are barred by the five-year
8 statute of repose contained in Tennessee Code
9 Annotated, what, 48-1-122 -- whatever -- the
10 Tennessee Securities Act.

11 Further, the two-year statute of
12 limitations in the Securities Act and the
13 three-year statute of limitations that applies
14 to the common-law actions in this case, as
15 opposed to the statutory action, the three-year
16 statute of limitations and the two-year statute
17 of limitations each apply -- or begin to run,
18 one probably should properly say -- only when
19 the plaintiff knew or should have known that it
20 had sustained some kind of injury and had some
21 kind of entitlement to relief, although it may
22 not have appreciated the legal basis of that
23 relief. And, of course, ordinarily this
24 question of when the plaintiff knew or should
25 have known of something that would put into

1 motion the statute of limitations or start it
2 running is ordinarily a question of fact. I
3 agree with the plaintiffs about that quite
4 wholeheartedly. But it's clear by the
5 appellate opinions in this state that if the
6 complaint alleges circumstances that shows that
7 the statute of limitations has run, that it's
8 proper to deal with that by a motion to
9 dismiss, and it's not necessary to have the
10 jury or a fact-finder pass on that issue.

11 In this case, the gist of plaintiff's
12 lawsuit -- and I oversimplify it, but the gist
13 of plaintiff's lawsuit is that the rating
14 agencies used inappropriate or improper ratings
15 for the securities involved in this case, and
16 that those ratings were, among other things,
17 tainted by the fact that the issuers have paid
18 the raters a fee, and that there was a conflict
19 of interest growing out of that arrangement
20 because the issuers were alleged to have talked
21 to the rating agencies and made it clear what
22 ratings were needed and indicated that the
23 rating agencies' business from a particular
24 issuer might well be affected by what kind of
25 rating the issuer made in a particular case.

1 Anyway, the plaintiff has alleged at length
2 that the ratings were tainted by various items
3 of conflict of interest, and so it appears in
4 this case that the very theory upon which the
5 plaintiff proceeds is grounded upon various
6 things that were discovered and made public
7 knowledge long before the plaintiff filed a
8 lawsuit in this case.

9 The Court remembers from the pleadings that
10 the Congress dealt with ratings by rating
11 agencies and passed comprehensive legislation
12 dealing with some of the problems that
13 plaintiff mentions here in 2006; in 2007 there
14 was considerable public notoriety about the
15 role of rating agencies and whether or not they
16 were laboring under conflicts of interest and
17 engaged in other wrongdoing; the rating
18 agencies in this case, according to the
19 plaintiff's complaint, began to re-rate or
20 issue downgrades in the ratings that they had
21 employed, on the very securities that the
22 plaintiff employed -- I mean purchased -- and
23 that all took place in 2007; and that in 2007
24 the Wall Street Journal wrote at length about
25 the very problems that are the basis of

1 plaintiff's lawsuit; and, finally, the United
2 States Congress released a report in July of
3 2008 that called attention to all of these
4 problems. And I just really cannot see how
5 anybody that was in charge of investments at a
6 banking institution could have not been aware
7 of all of these problems by at least July of
8 2008.

9 It is the opinion of the Court that when
10 this suit was filed on September 15, 2011, more
11 than three years after the Senate released the
12 report to which we've alluded, that that came
13 more than two years and indeed more than three
14 years after the plaintiff knew or should have
15 known these problems, and hence the Court is
16 constrained to conclude that the pleadings in
17 this case reveals that the common-law actions
18 and the statutory action are barred by the
19 two-year and three-year statute of limitations
20 that apply in this case.

21 And finally we've come to the most
22 difficult problem in the case, and that is
23 whether this complaint that the plaintiff has
24 filed is sufficient to pass muster as a
25 complaint seeking damages that basically are

1 based upon averments of fraud. And we all
2 talked at length here about the fact that the
3 Tennessee Rules of Civil Procedure require
4 allegations of fraud to be stated with
5 particularity.

6 And I mean no disrespect to the plaintiff,
7 and they've done a marvelous job, and I've
8 enjoyed the debate that you've had with me, but
9 I'm sort of like Mr. Griffin when I read this
10 complaint the first time; I said, boy, that
11 thing has got a lot in it, but does it say
12 anything? Does it really say that there is a
13 cause of action for fraud, constructive fraud,
14 negligent misrepresentation, violation of the
15 Tennessee Securities Act, unjust enrichment?

16 And plaintiff has done a marvelous job of
17 trying to draw everybody who might have had
18 some connection with these transactions into
19 this case, and perhaps that explains in part
20 the manner in which the matter has been
21 presented in the complaint. And I'm not
22 criticizing anybody for that; please don't
23 misunderstand. I said once before and I say
24 again, it's cleverly done, but does it pass
25 muster under the standards of pleading that I

1 believe we are constrained to follow?

2 And I look at the complaint and find that
3 it doesn't appear to me that it attributes any
4 misrepresentation, any statement of fact, any
5 false statement of fact, to any particular
6 individual; it attributes it to all of them.
7 It is truthfully -- most of the statements
8 contained in the complaint, in my opinion, are
9 opinion and forward looking in nature and
10 involve conjecture about the creditworthiness
11 of these securities that are involved in this
12 case.

13 The complaint incorporates the offering
14 circulars, or prospectuses, that were used by
15 the parties to market these securities, and the
16 statements in those offering circulars, to
17 which I think can be concluded the plaintiff
18 ascribed, negates the averments of any
19 reasonable reliance or justifiable reliance by
20 the plaintiff upon those statements that the
21 plaintiff claims were uttered falsely, in the
22 case of fraud, common-law fraud, uttered with
23 intent to deceive.

24 Furthermore, it's fair to say that the
25 allegations of constructive fraud and negligent

1 misrepresentation, as well as violations of the
2 Securities Act, all require a statement of some
3 statement of fact, past or existing, which is
4 false and which was uttered under circumstances
5 that would create liability. And insofar as
6 constructive fraud and negligent
7 misrepresentation is concerned, scienter is not
8 a requirement, but our law very wisely says
9 there must be a substitute for scienter, and
10 that substitute must be the existence of some
11 duty which would place upon defendants in
12 negligent-misrepresentation or
13 constructive-fraud cases a duty to speak
14 carefully, in the case of negligent
15 misrepresentation, or truthfully, in the case
16 of constructive fraud. And I find the
17 complaint devoid of the necessary allegations
18 to make a case for fraud.

19 And so for those reasons, I feel
20 constrained to also sustain the motions to
21 dismiss based upon a failure to state a cause
22 of action or state a claim for which relief can
23 be granted that have been filed by each and all
24 of the defendants in this case.

25 I leave it to counsel about whether they

1 want to try to file a joint order that would
2 dispose of all these matters or file separate
3 orders, but I trust that you all can deal with
4 that.

5 I guess I did not say a minute ago with
6 specificity what I thought about the claim for
7 unjust enrichment. And I say again in that
8 regard that, in my very humble and honest
9 opinion, this is not a case of unjust
10 enrichment, unless the unjust enrichment is
11 going to be based upon a finding that someone
12 was guilty of fraud or constructive fraud or
13 negligent misrepresentation, and it's
14 questionable, in my judgment, whether unjust
15 enrichment can be applied in a negligent
16 misrepresentation case. But I simply don't
17 think that this is a case for the application
18 of the rule or law of unjust enrichment. As I
19 said before, I believe that unjust enrichment,
20 under our law, is designed to provide a remedy
21 when for some reason a contract does not exist
22 between parties or is otherwise unenforceable
23 and the circumstances are such that warrant the
24 Court to imply a contract to pay the reasonable
25 value for goods and services that have been

1 supplied by the plaintiff to the defendant. I
2 just don't think that fits here. Our law has
3 some meaning, folks. This is a learned
4 profession. We think about things, and we
5 carve out rules to deal with them, and we just
6 can't say anything goes. And so I struggled
7 with that a lot.

8 I think I have dealt with all the motions
9 that are presently pending before this Court
10 except the motions to sever based on misjoinder
11 arguments, and it is my opinion, based upon
12 what I've already done here today, that those
13 motions should await another day, and so they
14 are most respectfully pretermitted.

15 All right. Do you have a question? Go
16 ahead, Counsel.

17 MR. GIMBEL: I just have one brief
18 clarification, Your Honor, just because, as you
19 noted, this could go up to the Court of
20 Appeals. I believe when you were granting the
21 defendants' motions on personal jurisdiction,
22 you referred to the issuers' and the ratings
23 agencies' motions, and I just wanted --

24 THE COURT: I referred to what?

25 MR. GIMBEL: The motions by the issuers and

1 the ratings agencies to dismiss on personal
2 jurisdiction grounds. I wanted just to confirm
3 on the record that it applies to the
4 collateral --

5 THE COURT: The collateral manager too.
6 Thank you. I meant to mention that, and I
7 simply overlooked it.

8 MR. GIMBEL: Thank you, Your Honor.

9 THE COURT: This is correct. It will apply
10 to the collateral manager.

11 I did not address a minute ago the
12 preemption issue either. I think our law on
13 that issue is pretty much in its infancy, but I
14 cannot read that act in any way to conclude
15 that, insofar as a claim is based upon
16 negligence against a rating agency, that that
17 act is designed by Congress to preempt such
18 litigation. And I sustain the rating agencies'
19 motion on that additional ground.

20 Also, I didn't address some arguments that
21 have been made in the briefs, not referred to
22 here today, about proximate cause or loss
23 causation. And I think that's a real good
24 question in this case, but I do not believe
25 that that's a matter that can be dealt with as

1 a pleading problem today on the state of this
2 record, so I'm purposely not granting a motion
3 to dismiss based upon the failure to allege
4 proximate causation or what's commonly referred
5 to, I think, in securities litigation as loss
6 causation, but it raises a very good and
7 important question.

8 All right. Have I messed things up so much
9 that they can't be un-messed now? Anybody?

10 All right. Thank you all very much. I
11 hope you have a great holiday.

12 And you may adjourn court for us until nine
13 o'clock Monday morning.

14 THE BAILIFF: Tuesday morning --

15 THE COURT: Tuesday morning.

16 THE BAILIFF: -- nine o'clock. Court is
17 adjourned.

18 (End of transcript.)
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C E R T I F I C A T E

STATE OF TENNESSEE

COUNTY OF ANDERSON

I, Jana Neighbors, RPR, CCR, LCR, and Notary Public, do hereby certify that I reported in machine shorthand the above proceedings, that the foregoing pages were transcribed by me and constitute a true and accurate record of the proceedings.

I further certify that I am not an attorney or counsel of any of the parties, nor an employee or relative of any attorney or counsel connected with the action, nor financially interested in the action.

Signed and dated this 29th day of May, 2012.

Jana Neighbors, RPR, CCR, LCR
Tennessee LCR #013
Expiration Date: June 30, 2012
Notary Public
My Commission Expires:
May 21, 2013